are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the Judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable.") It has also been said that the words of the statute speak the intention of the legislature (see *Warburton v. Loveland* [1832] 2 D & CL (H.L) 480, 489; 6 ER 806). In an appeal from India, Viscount Simon LC in delivering the advice of the Privy Council in *King Emperor v. Bensari Lal Sarma* [1945] 72 IA 57, 70 said:

> Again and again this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injuries or otherwise, which may follow from giving effect to the language used.

This Court shall give effect to s. 2 of the Third Schedule in favour of the appellant. The case is to be transferred to the Sessions Court, Kuala Lumpur forthwith.

The appeal is allowed with costs.

Appeal allowed.

UNITED OVERSEAS BANK LTD.

v.

HEAP HUAT RUBBER CO. SDN. BHD.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[CIVIL SUIT NO. 22-206 OF 1991]
27 JUNE 1993

PRACTICE & PROCEDURE: Application for amendment of statement of defence - Whether application was bona fide - Whether proposed amendments would change character of suit from one to that of another.

The plaintiffs obtained summary judgment against the defendants before the Senior Assistant Registrar and the defendants appealed. The defendants then applied for amendment of the statement of defence and counterclaim. The plaintiffs contended that the application was not *bona fide* and alleged that it was done with the purpose of improving the defendants position at the hearing of the appeal against the Senior Assistant Registrar's decision for summary judgment.

The plaintiffs further contended that the proposed amendments would change the character of the suit from one to that of another. The defendants on the other hand submitted that the proposed amendments were mainly amplificatory and explanatory in nature to those facts which were already in existence and as contained in the statement of defence.

Held:

[1] An appeal from the decision of the Senior Assistant Registrar to the Judge in Chambers is by way of a re-hearing and such being the case the trial Judge would be considering all matters virtually afersh. As such applications for amendments at this stage should be allowed.

[2] The proposed paragraph 2A of the statement of defence brings in illegality relating to enforcement contrary to public policy in Singapore and of defrauding the Public Administration of Singapore. The issue of illegality has no relationship to paragraph 2 of the statement of defence being of a completely new character and to allow the amendment would in effect turn this suit which is of one character into that of another and inconsistent character.

[3] The proposed paragraph 2B is not only new but in direct contradiction to paragraph 2 of the statement of defence. This direct conflict not

only alters the character of the suit to that of another but also questions the *bona fide* of the defendants relating to the proposed amendments of this paragraph.

[4] The proposed amendment to paragraph 5(c) of the statement of defence was made *bona fide* as substantial facts on which this amendment is based have already been disclosed. The proposed amendment did not change the character of the suit and any prejudice caused could be compensated by costs.

[5] The proposed amendment to paragraph 7 of the statement of defence was merely to plead the fact that the transactions took place in Singapore and as the statement of defence contained allegations relating to transactions in Singapore, it was only justifiable to plead such facts.

[Application for amendment allowed in part].

Cases referred to:

Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1993] 1 CLJ 191 / [1983] 1 MLJ 213 ***(foll)***

Utama Wardley Bhd. v. Lenggang Laut Development Sdn. Bhd. [1983] 1 MLJ 213 ***(refd)***

Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd. [1988] 2 CLJ 473 ***(refd)***

Ismail bin Ibrahim v. Sum Poh Development Sdn. Bhd. [1988] 3 MLJ 348 ***(refd)***

Lin Securities (Pte.) v. Noone & Co. Sdn. Bhd. [1989] 2 CLJ 844 / [1989] 1 MLJ 321 ***(refd)***

D & C Bank Bhd. v. Abdul Ismail [1989] 1 CLJ 190 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 20 r. 5(1), (5)

For the plaintiffs - C.V. Dass, John Matthew and Ong Chee Yong; M/s. Ho Thian Cheh & Co.

For the defendants - Paul Tan, Teh Poh Teik, Chok Chin You and Shao Kam San; M/s. Yeo, Tan, Hoon & Tee

JUDGMENT

James Foong J:

This is an application by the defendants *inter alia* to amend their defence in the manner as set out in their proposed draft amended defence and counter-claim.

The proposed amendments can be divided into three parts. They are as follows:

(1) proposed amendment to paragraph 2 to read as follows:

2A In amplification of paragraph 2 above the defendants contend that the said three loan agreements are void and/or unenforceable against the defendants for illegality and that its enforcement would be contrary to public policy in Singapore as the said transaction was contrary to the banking laws of Singapore, and and/or with a view to defraud the public administration of Singapore, namely, the Monetary Authority of Singapore and/or Controller of Housing of Singapore.

Particulars

The loan of S$10 million which was given under the second supplemental loan agreement dated 1 March 1984 was never intended for the use of the defendant but was a sham transaction purportedly for the development of the housing project of the defendant, when in truth it was intended by the parties, that the funds would be channelled ultimately to Far Eastern Bank Limited, for the use of the South Union Group to clear their outstanding loans to Far Eastern Bank Limited, specifically, that of Mercator Pte. Ltd. At all material times the defendant was a member of the South Union Group of companies. The plaintiff disguised the loan it was actually granting to the South Union Group as a housing project loan to the defendant.

2B Further and/or in the alternative, the defendants aver that in respect of Term Loan 3, there was a total absence of consideration in respect of the S$9 million that was paid to Far Eastern Bank Limited for the account of Mercator Pte. Limited, and by reason thereof in respect of the portion of S$9 million, the same together with such interests and other charges that had been added thereto is not recoverable from and/or otherwise unenforceable against the defendants.

(2) proposed amendment to add to paragraph 5(c) to read as follows:

5(c) the plaintiffs, having obtained a Power of Attorney from the defendants on or about the 15th. day of December 1987, and was in sole control of the housing project and all matters relating thereto (including the servicing of the said Loan Agreements) to the exclusion of the defendant until todate. The defendant avers that the plaintiff had been negligent and/or failed to take

reasonable care and/or failed to act with due diligence in collecting the progress payments from the purchasers of the 63 units that had been sold at the time of the granting of the Power of Attorney, and in respect of the sale and collection of the proceeds of the remaining 26 units and 1 vacant lot after the granting of the said Power of Attorney, further and better particulars whereof will be given after discovery and inspection.

(3) proposed amendment to add to para 7 to read as follows:

7A The defendant further avers that the transactions between the plaintiff and the defendant are and were at all material times and in all material aspects governed by Singapore Law.

Before I proceed further, it would be appropriate to state that before the hearing of this application, the Senior Assistant Registrar had granted a summary judgment under an O. 14 application in favour of the plaintiffs. An appeal to the Judge of the High Court was to be heard but, adjourned for the determination of this application.

Mr. Paul Tan, Counsel for the defendants brought to my attention the oft quoted case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213 which expound the principles to be applied for amendments. The principles which the Court should be guided by are as follows:

(a) whether the application was *bona fide;*
(b) whether the prejudice caused to the other side can be compensated by costs, and
(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

In addition thereto, Mr. Paul Tan submitted that amendments can be applied for by either party to the suit at any time, even after judgment has been delivered. For this purpose, he quoted the case of *Utama Wardley Bhd. v. Lenggang Laut Development Sdn. Bhd.* [1983] 1 MLJ 213, where Justice Siti Norma considered an application for amendments after judgment under O. 14 had been entered against the defendants. Similarly, in the case of *Pan-Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.* [1988] 2 CLJ 473, Justice Dr. Zakaria also considered it not improper for the plaintiffs to amend their statement of claim when there is an appeal pending from the decision of the Registrar.

Mr. Paul Tan submitted that the proposed amendments are mainly amplificatory and explanatory in nature to those facts which are already in existence and as contained in the statement of defence.

Mr. C.V. Dass, Counsel for the plaintiffs objected to this application. He contended that, in the first instance, this application is not made *bona fide*. It is done with the purpose of improving the defendants' position at the hearing of the appeal against the Senior Assistant Registrar's decision for summary judgment. This is a "tatical manoeuvre" (a term borrowed from the decision of Justice Dzaiddin in the case of *Ismail bin Ibrahim v. Sum Poh Development Sdn. Bhd.* [1988] 3 MLJ 348, where application for amendment was disallowed), to rob the plaintiff of its existing summary judgment.

In addition thereto, Mr. Dass also contended that the proposed amendments will in effect change the character of the suit from one to that of another. Further, he argued that if going by the defendants' contention that the proposed amendments are for amplification and explanation then, there is no such necessity as, the statement of defence is sufficiently pleaded.

Order 20 rule 5(1) of the Rules of High Court, provides that:

> ... the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such term as to costs or otherwise as may be just and in such manner (if any) as it may direct.

"At any stage of the proceedings" to my mind would be applicable to a situation as in the circumstances of this case where summary judgment has been granted but the matter is pending appeal to the Judge in Chambers. As correctly stated in *Pan Electric Appliances (Pte.) Ltd. v. Electrical & Allied Industries Bhd.*, an appeal from the decision of the Senior Assistant Registrar to the Judge in Chambers is by way of a rehearing and such being the case, the trial Judge would be considering virtually all matters afresh. As the Judge would be determining the issues afresh, application for amendments at this stage should be allowed.

It has also been brought to my attention by both Counsel for the plaintiffs and the defendants that the proposed amendments may have some bearing to two conflicting decisions now existing at the High Courts. In the case of *Lin Securities (Pte.) v. Noone & Co. Sdn. Bhd.* [1989] 1 MLJ 321, Justice V.C. George ruled that in an O. 14 application parties need not abide by its pleadings but, is entitled to submit over and above what has been pleaded. However, in the case of *D & C Bank Bhd. v. Abdul Ismail* [1989] 1 CLJ 190, Justice Siti Norma held that submissions in an O. 14 application should be restricted to the four corners of the pleadings.

The defendants, I am brought to believe are apprehensive on what this Court may rule during the hearing of the appeal against summary judgment. If a narrower interpretation is being adopted then, without such amendments, the defendants' arguments at the appeal stage may be restricted. On this matter, this Court will not take congnisance of an anticipated situation for what is before me is not on the issue of appeal but, that of an application for amendment. This Court shall not be involved in determining anticipated objections on issues that are not before it where different principles for consideration apply. What is before this Court now is that of an application for amendment and this Court shall confine its finding to this issue.

I shall now proceed to consider each part of the proposed amendments. In order to consider the proposed amendments with the addition of paragraph 2A, one must first of all read paragraph 2 of the statement of defence itself.

Paragraph 2 as it is reads as follows:

> The defendants admit only the existence of the three (3) Loan Agreements as referred to in Paragraph 2 but contend that they are void and/or unenforceable against the defendants who have otherwise provided sufficient consideration for the loans as expressly requested by the plaintiffs.

However, instead of amplifying as indicated by the word "In amplification" as contained in paragraph 2A of the proposed amendment, the defendants proceeded in this proposed new paragraph to bring in illegality relating to enforcement contrary to public policy in Singapore and of defrauding the Public Administration of Singapore. This has completely no relationship whatsoever with paragraph 2 of the statement of defence.

Mr. Paul Tan argued that the amplification is on the words "void and/or unenforceable" in paragraph 2 but, these two allegations relate to sufficient consideration being provided for the said loans. This is expressly spelt out in paragraph 2 after the words "void and/or unenforceable". They have no connection or link with the illegality as alleged in the proposed amendment. The issue of illegality is completely of a new character and to my mind, to allow such an amendment would in effect turn this suit which is of one character into that of another and inconsistent character.

As for the other proposed amendments in the paragraph with the addition of paragraph 2B, this again is not only new but, in direct contradiction to paragraph 2 of the Statement of Defence. On one hand in paragraph 2, the defendants alleged sufficient consideration has been provided for the said loans whilst, in the proposed para 2B, "a total absence of consideration in respect of the S$9 million". This direct conflict not only alters the character of the suit to that of another but, also questions the *bona fide* of the defendants relating to the proposed amendments of this paragraph. By raising these issues of a totally different character the defendant could be suspected of a tactical manoeuvre to gain advantage at the hearing of the appeal against the summary judgment.

Such being the case, the proposed amendments to paragraph 2 must be rejected.

I shall now deal with the proposed amendments to paragraph 5(c) of the statement of defence. This proposed paragraph will add to paragraph 5 of the defence a new cause of action, that of negligence. Negligence in this case relates to that of the exercise of the Power of Attorney granted by the defendants to the plaintiffs as stated in paragraph 5(c) of the defence. This new cause of action, I find, does arise out of the same facts or substantially the same facts as a cause of action for breach of contract alleged in paragraph 5(b) of the defence and, similarly claimed for as breach of contract and/or negligence in the counter-claim. Order 20 r. 5(5) of the Rules of the High Court allow such an amendment though, with the addition of a new cause of action. For this proposed amendment I find it being made *bona fide* as substantial facts on which this amendment is based have already being disclosed. It does not change the character of the suit and any prejudice caused can be

compensated by cost. I accordingly allow this amendment to paragraph 5(c) of the statement of defence.

As for the third part of the amendment, that the transactions between the parties are and were at all material times and in all material aspects governed by Singapore Law, Mr. Dass pointed out that points relating to law should and need not be pleaded. However, Mr. Paul Tan argued that the defendants are not pleading the law but that the transactions took place in Singapore.

There are allegations by the defendants that the transactions did take place in Singapore. A case in point is found in paragraph 4 of the statement of defence where, it was alleged that the loan agreements were for the sole purpose of financing a housing project in Singapore. Again in para 5(b) of the statement of defence, the defendants did contend that the plaintiffs have failed to operate the project account as provided under the provisions of the laws in Singapore. All these are allegations relating to transactions in Singapore and it is only justifiable to plead such facts. Applying the principles as laid down in *Yamaha*'s case, I allow the application for amendment to this part.

VOON MOW CHEN

v.

MENTERI DALAM NEGERI & ANOR. AND FIVE OTHER CASES

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPLICATION NO. 44-29-92, 44-33-92, 44-71-92, 44-81-92, 44-86-92, 44-90-92]
29 JUNE 1993

PRACTICE & PROCEDURE: Application for writ of habeas corpus - Affidavits in reply filed by the respondents - Whether affidavits in reply defective - Whether affidavits admissible in evidence.

Six criminal applications for writs of *habeas corpus* were heard together the sole issue being that the various affidavits in reply filed by the respondents were defective and were therefore inadmissible for the Court's consideration and afforded no answer to the applications.

Counsel for the applicants contended that the affidavits were defective for one or more of the following reasons:

(i) that the words "akui" or "diakui" were used in the respective affidavits.
(ii) that some of the affidavits were not signed by the deponent and some were not signed by the Commissioner of Oaths.
(iii) that some of the affidavits ended on a page and the jurat began on the following page or that the page bearing the jurat did not contain a substantial averment or spill-over of part of the last substantial averment in the affidavits.

The learned Senior Federal Counsel contended that by virtue of Order 2 rule 1 of the Rules of the High Court 1980 (RHC 1980), the failure to comply with format should be treated as a mere irregularity and should not affect the proceedings.

The further question that arose for determination was whether, as the parties had expressly agreed to stand or fall on the issue of the defective affidavits, it was proper for one party to subsequently renege on the undertaking and to be allowed to make further submissions.

Held:

[1] In an affidavit the permissible words to be used would be "ikrar" or "berikrar" for "affirm"